

1 The Honorable Ricardo S. Martinez
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UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON

9 RUSSELL H. DAWSON, Personal
10 Representative of the Estate of Damaris
Rodriguez; REYNALDO GIL; JOSE
MARTE; A.G.; I.G.; S.G.; D.G.,

11 Plaintiffs,

12 v.

13 SOUTH CORRECTIONAL ENTITY
14 ("SCORE"), a Governmental Administrative
15 Agency; PENNY BARTLEY; JIM KELLY;
16 TODD BARKER; BRITTNEY PALMORE;
17 BRANDON HEATH; PEDRO SANTOS;
18 MANDI JARAMILLO; WILLIAM WOO;
19 BENDA SCOTT a/k/a BRENDA SCOTT;
20 ETHAN GLOVER; CHRISTOPHER FOY;
21 JANE DORE; COLMINTON ALLEN;
22 AARON SEIPP; SCORE JOHN DOES 1-
23 10; NAPHCARE, INC., an Alabama
24 Corporation; REBECCA VILLACORTA;
HENRY TAMBE; NANCY WHITNEY;
BILLIE STOCKTON; BRITTANY
MARTIN; JESSICA LOTHROP; BROOKE
WALLACE; SALLY MUKWANA; JOAN
KOSANKE; RITA WHITMAN; VIRGINIA
RICHARDSON; NAPHCARE JOHN
DOES 1-10; KING COUNTY, a political
subdivision of the State of Washington;
RAUL ADAMS; LELAND ADAMS;
ALAN TAG,

25 Defendants.

26
27 No. 2:19-cv-01987-RSM

DEFENDANT SCORE'S RENEWED
MOTION FOR SUMMARY
JUDGMENT

NOTE ON MOTION CALENDAR:
Friday, October 15, 2021

I. MOTION

Defendant South Correctional Entity (“SCORE”), by and through its attorneys of record, move this Court pursuant to Fed.R.Civ.P. 56 for an order of partial summary judgment dismissing all of Plaintiffs’ liability claims against SCORE.¹ If this motion is granted, no direct liability claims will remain against SCORE, and no questions related to SCORE’s direct liability should be posed to the jury. Plaintiffs also contend that Washington law renders SCORE *vicariously* liable for any medical negligence committed by NaphCare. But, respondeat superior is not a substantive cause of action – it operates as a legal rule. This claim should be dismissed as well.

This motion is substantially similar to the motion initially filed as *Dkt. No. 145*. A partial compromise of claims against SCORE made many of the arguments raised in *Dkt. No. 145* moot; those now-irrelevant arguments are not included herein.² Pursuant *Dkt. No. 164* (stipulation allowing SCORE to re-note its motion), SCORE is re-noting this updated motion, which only addresses the limited issues that are in controversy.

II. STATEMENT OF FACTS

On December 30, 2017, Damaris Rodriguez was arrested for Assault 4 – Domestic Violence, and transported to the South Correctional Entity (SCORE) Jail and received at approximately 2:40 p.m. *Dkt. No. 146, DiCroce Dec., Exh. 1.* At intake, Ms. Rodriguez was uncooperative and her behavior was indicative of potential drug intoxication, mental illness, or both. SCORE contracts with a private health care company, NaphCare, to provide both medical and mental health care to the individuals in its custody. *Id.*

NaphCare medical personnel were aware of Ms. Rodriguez and saw her numerous times while she was in custody. *Id.*, ex. 2. Plaintiff have alleged that NaphCare's negligence

¹ This motion addresses both the “direct” liability claims against SCORE -- the claims that allege correctional officers’ failures, and the “vicarious” liability claims for medical negligence claims against Defendant NaphCare for which Defendant SCORE might have liability. *See, Plaintiffs’ Motion for Partial Summary Judgment on Vicarious Liability, Dkt. 106* (pending). This is based on a “non-delegable duty” that Plaintiffs characterized as creating vicarious liability.

² The Court recently entered an Order dismissing all of the individual SCORE Defendants, and all claims against SCORE except for the state law negligence causes of action. *Dkt. No. 204*

1 in the provision of medical and mental health care proximately caused Damaris's eventual
 2 death. *See* Plaintiffs' motion for summary judgment, Dkt. 153. Although there have been
 3 extensive expert opinions disclosed in this case, there is no competent evidence proving that
 4 SCORE's alleged wrongdoing was a proximate cause of Ms. Rodriguez's death. Further,
 5 there is no competent evidence that SCORE was negligent in hiring NaphCare or training
 6 NaphCare's employees.

7 III. LAW AND ARGUMENT

8 A. Standards on Summary Judgment.

9 Summary judgment "is an important procedure 'designed to secure the just, speedy
 10 and inexpensive determination of every action.'" *Smith v. Board of County Commissioners*,
 11 216 F.Supp.2d 1209, 1213-1214 (D. Kan. 2002), quoting, *Celotex Corp. v. Catrett*, 477
 12 U.S. 317, 106 S.Ct. 2548 (1986). Under FRCP 56(c), summary judgment should be granted
 13 if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a
 14 judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct.
 15 2505 (1986). The "mere existence of some alleged factual dispute between the parties will
 16 not defeat an otherwise properly supported motion for summary judgment . . . Only
 17 disputes over facts that might affect the outcome of the suit under the governing law will
 18 properly preclude the entry of summary judgment. Factual disputes that are irrelevant or
 19 unnecessary will not be counted." 477 U.S. at 247-248.

20 The "party opposing a properly supported motion for summary judgment may not
 21 rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts
 22 showing that there is a genuine issue for trial." 477 U.S. at 248, quoting, *First National*
 23 *Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-289, 88 S.Ct. 1575 (1968)
 24 (emphasis added.) When "the nonmoving party has the burden of proof at trial, the moving
 25 party need only point out 'that there is an absence of evidence to support the nonmoving
 26 party's case.'" *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001). *See also Fairbank*
 27 *v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir.2000) (holding that the *Celotex*

1 "showing" can be made by "pointing out through argument--the absence of evidence to
 2 support plaintiff's claim").

3 **B. Plaintiffs Last Remaining Claims Against SCORE For State Law Negligence
 4 Should Be Dismissed.**

5 **1. Plaintiffs Cannot Establish Duty, Breach or Causation as to Their
 6 Direct or Vicarious Liability Claims.**

7 Plaintiffs set out two separate negligence causes of action, *See, FAC, Dkt. 49*. The
 8 first states merely "All Defendants had a duty of reasonable care to Damaris, breached that
 9 duty, and proximately caused Plaintiff's damages." *Id.* at ¶ 227. These allegations are
 10 without merit.

11 First, there is no evidence that anything that SCORE or its employees did was
 12 negligent. Ms. Rodriguez was booked and when her behavior became noticeable, a
 13 NaphCare mental health professional was promptly notified. And a nurse attempted to
 14 evaluate her in the booking wing within three hours of her arrival, and three more times the
 15 following morning. After this time, any concerns are regarding medical treatment (which is
 16 directed at NaphCare). *See, supra.*

17 More importantly, this is a medical malpractice cause of action, and can only be --
 18 and has only been -- brought against NaphCare. None of Plaintiffs' experts have offered
 19 any foundational medical malpractice opinions against SCORE. This is required under the
 20 statute. In a medical malpractice claim, a plaintiff needs testimony from a medical expert to
 21 establish two required elements—standard of care and causation. RCW 7.70.040; *Grove v.*
 22 *PeaceHealth St. Joseph Hosp.*, 182 Wn.2d 136, 144, 341 P.3d 261 (2014).

23 This is fatal to Plaintiffs' first negligence claim. This claim should be dismissed.

24 **2. Plaintiffs Cannot Advance a Claim for Direct Liability for Negligent
 25 Failure To Train or Negligent Hiring Because Defendant SCORE's
 26 Employees Acted Within The Scope of Their Employment.**

1 The second cause of action alleges that SCORE “failed to train” its employees, and
 2 that SCORE was negligent in “hiring” NaphCare. Id., at 232, 234. To the extent that
 3 Plaintiffs second cause of action makes any allegations directly against SCORE, there is no
 4 evidence to support them. See above.

5 Nor are these authorized theories under Washington law: negligent training and
 6 hiring claims do not apply unless the agent was acting *outside* the scope of their
 7 employment. But, Plaintiffs allege SCORE is liable for its employees conduct “which at all
 8 relevant times was within the course and scope of their employment.” *FAC, Dkt. 49*, at
 9 ¶¶26, 34, 35.

10 The cause of action for negligent hiring was created to address “the need for such a
 11 cause of action in cases where the employee acted outside the scope of his or her
 12 employment, thereby rendering liability under *respondeat superior* unavailable.” *Lee ex*
 13 *rel. Estate of Lee v. J.B. Hunt Transport, Inc.*, 308 F.Supp.2d 310, 314 (S.D.N.Y. 2004)
 14 (emphasis in original). Washington courts have reached the same conclusion:

15 An employer is generally vicariously liable for negligent acts of an
 16 employee conducted *within the scope* of employment. When an employee
 17 causes injury by acts *beyond the scope* of employment, an employer may
 18 be liable for negligently supervising the employee.

19 *Gilliam v. Dep’t of Soc. & Health Servs.*, 89 Wn. App. 569, 584-85, 950 P.2d 20, *review*
 20 *denied*, 135 Wn.2d 1015 (1998) (emphasis supplied). *Peck v. Siau, supra* at 294 (“The
 21 Restatement (Second) of Torts § 317 describes the liability of an employer for conduct of
 22 an employee committed *outside the scope of employment*.”) (emphasis supplied).³

23 Any claims for direct negligence for failure to train or hiring should be dismissed.

24
 25
 26 ³ See also, *Scott v. Blanchet High Sch.*, 50 Wn. App. 37, 43, 747 P.2d 1124 (1987), *review denied*,
 27 110 Wn.2d 1016 (1988); *Peck v. Siau*, 65 Wn. App. 285, 288, 827 P.2d 1108, *review denied*, 120
 Wn.2d 1005, 838 P.2d 1142 (1992); and, Restatement (Second) of Torts § 317(b)(ii).

1 **3. Vicarious Liability Is Not a Substantive Cause of Action.**

2 Plaintiffs' second cause of action also alleges that SCORE is vicariously liable for
 3 the medical negligence committed by NaphCare defendants. *FAC*, *Dkt.* 49, at ¶228
 4 ("SCORE, SCORE Employee Defendants, NaphCare, and NaphCare Employee Defendants
 5 had an affirmative duty to protect Damaris and facilitate or provide her with adequate
 6 medical care, mental health care, and/or nursing care. This duty was non-delegable and
 7 applicable to both SCORE and NaphCare while Damaris was in the custody of SCORE.").

8 This claim is distinct from SCORE itself committing any act of negligence. And
 9 Plaintiffs may only assert vicarious liability claims against SCORE for its own employees'
 10 negligent actions (of which there was none). SCORE's vicarious liability for the acts of
 11 NaphCare, if any, would occur by operation of law. This is not a substantive cause of
 12 action.

13 "Respondeat superior is a common law principle of secondary liability and
 14 generally 'summarizes the doctrine that a master or other principal is responsible, under
 15 certain conditions, for the conduct of a servant or other agent.'" *Hollinger v. Titan Capital*
 16 *Corp*, 914 F.2d 1564, 1576–77 n. 28 (9th Cir.1990) (citation omitted). *See also, Fulbright v.*
 17 *Dayton Sch. Dist. No. 2*, 13-CV-0030-TOR, 2013 WL 1497388, at *6 (E.D. Wash. 2013)
 18 ("to the extent that Plaintiffs allege respondeat superior as a separate cause of action, the
 19 claim is dismissed.").

20 Any claim of vicarious liability based on SCORE's non-delegable duty to provide
 21 medical care is not legally viable and should be dismissed.

22 **IV. CONCLUSION**

23 All of Plaintiffs' remaining claims against SCORE should be dismissed. First, as to
 24 claims of direct negligence there is no evidence that SCORE was negligent or that any
 25 alleged negligence proximately caused Ms. Rodriguez's death. And, Plaintiffs cannot assert
 26 a negligent training or hiring claim because SCORE's employees acted within the scope of
 27 their employment. Second, as to any vicarious liability claims based on a non-delegable

1 duty, this is not a substantive cause of action; it is a legal principle. Accordingly, SCORE
2 requests that the Court grant its motion for summary judgment on all of Plaintiffs' claims
3 against SCORE.

4
5 DATED: September 23, 2021

6 KEATING, BUCKLIN & McCORMACK, INC., P.S.
7

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CERTIFICATE OF SERVICE

I hereby certify that on the below date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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17 and I hereby certify that I have mailed by United States Postal Service the document to the
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19 DATED: September 23, 2021

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